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No. 80-1664

IN THE

Supreme Court of the United States

October Term. 1980

CONSUMERS UNION OF UNITED STATES, INC. AND VIRGINIA CITIZENS CONSUMER COUNCIL,
Appellants,

v.

VIRGINIA STATE BAR, *et al.*,
Appellees.

On Appeal from the United States District Court For the Eastern District of Virginia

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JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Is it manifestly unjust to award attorneys' fees to private attorneys general who vindicate important constitutional rights against a state bar association that proposed and enforced an unconstitutional code, solely because the bar attempted, a year after the suit was brought, to have the rule amended in a manner that would not have eliminated the Rule's infringements on those constitutional rights?

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IN THE

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No.

CONSUMERS UNION OF UNITED STATES, INC. AND VIRGINIA CITIZENS CONSUMER COUNCIL,

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On Appeal from the United States District Court For the Eastern District of Virginia

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OPINIONS BELOW

The Order and Memorandum of January 8, 1981, from which this appeal is taken, are not yet published. They are set forth at pages 1 through 3 of the Appendix to this Jurisdictional Statement (hereafter "App."). Earlier decisions in this case are *Consumers Union* v. *American Bar Association,* 427 F. Supp. 506 (E.D. Va. 1976), *vacated and remanded sub nom. Consumers Union* v. *Virginia State Bar,* 433 U.S. 917 (1977), *Consumers Union* v. *American Bar Association,* 470 F.Supp. 1055 (E.D. Va, 1979), *vacated fee award and remanded sub nom. Supreme Court of Virginia* v. *Consumers Union,* 100 S. Ct. 1967 (1980); *vacated and remanded sub nom. Con-*

sumers Union v. *Virginia State Bar,* 100, S. Ct. 2980 (1980).[1]

JURISDICTION

On February 27, 1975, Consumers Union and Virginia Citizens Consumer Council (herein referred to as "Consumer Groups") brought this suit pursuant to the first and fourteenth amendments and 42 U.S.C. Section 1983. Appellants alleged that Disciplinary Rule 2-101(A)(6) of the Virginia Code of Professional Responsibility (herein referred to as "the Rule") infringed on their rights to gather and publish, and their members' right to receive, important factual information about services offered by individual lawyers.

Pursuant to 28 U.S.C. Section 2281, a three-judge district court was convened on April 14, 1975. The district court, on May 8, 1979, declared the Rule unconstitutional and permanently enjoined the Virginia Supreme Court ("Virginia Court") and Virginia State Bar ("Virginia Bar") from enforcing the Rule.[2] In addition, the district court directed the Virginia Court to pay appellants' costs and reasonable attorneys' fees under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. Section 1988. However, the court did not award fees or costs against the Virginia Bar, finding that special circumstances rendered such an award manifestly unjust.

The Virginia Court appealed the part of the Order awarding declaratory and injunctive relief and attorneys'

[1]The District Court's findings of fact are set forth in *Consumers Union* v. *American Bar Association,* 427 F.Supp. 506 (E.D. Va. 1976)

[2]This action was brought also against the American Bar Association ("ABA") and challenged the constitutionality of DR 2-102(A)(6) of the ABA's Code of Professional Responsibility. The district court dismissed the ABA as a defendant.

fees and costs, claiming judicial or legislative immunity from the Order. The Consumer Groups cross-appealed the denial of fees and costs against the Virginia Bar.

On June 2, 1980, the U.S. Supreme Court (herein referred to as "this Court") held that the Virginia Court was not immune from this suit for declaratory and injunctive relief. Nonetheless, this Court vacated and remanded the fee award against the Virginia Court because it was premised on legislative acts, for which the Virginia Court enjoyed legislative immunity. This Court also ruled that the District Court erred in finding that an award against the Bar is unjust and later vacated that judgment.

On remand, the district court held that the Consumer Groups, having prevailed against the Virginia Court, are entitled to an award of attorneys fees against the Virginia Court and its Chief Justice, in their official capacities. The district court entered an Order directing these defendants to pay reasonable attorneys fees to the Consumer Groups. However, fees were not awarded against the Bar because of its attempt, cited in the district court's earlier decision, to persuade the Virginia Court to amend the Rule.

On January 28, 1981, the Virginia Court appealed the fee award order both to this Court and to the U.S. Court of Appeals for the Fourth Circuit (herein referred to as "the Fourth Circuit"). On February 4, 1981, the Consumer Groups appealed the decision not to award attorney fees and costs against the Bar to this Court and to the Fourth Circuit.

If this Court has jurisdiction over the appeal of the Virginia Court, it also has jurisdiction over this cross-appeal from the same Order under 28 U.S.C. Section 1253 or the relevant case law, *Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 424 (1978); *Weiser* v. *White,* 505 F.2d 912 (5th Cir. 1975); *Haining* v. *Roberts,* 453 F.2d 1223 (5th Cir.

1971), *cert denied,* 406 U.S. 948 (1972). However, appellants believe that this Court lacks jurisdiction over both appeals, and will file a timely motion to dismiss. This jurisdictional statement is filed solely to preserve appellants' cross-appeal, should the Court hold that it has jurisdiction over the Virginia Court's appeal.

STATUTES INVOLVED

Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility, the constitutionality of which was at issue in this case, and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Section 1988, are set forth at App. 24-25.

STATEMENT OF THE CASE

Appellants are nonprofit organizations that, *inter alia,* publish information for their members and other consumers in Virginia. In August, 1974, Consumers Union attempted to publish a directory with information on lawyers' backgrounds, areas of legal practice, types of clientele represented, billing practices, and fees. The directory was intended to educate and assist appellants' members and other consumers in selecting legal counsel in Arlington County, Virginia.

The proposed directory was to include information prohibited under Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility ("Rule"). Appellants recognized that few, if any, lawyers would furnish information for the directory without the approval of the Virginia Bar. Appellants tried, without success, to obtain a formal ruling from the Bar stating whether attorneys who listed in the directory would be subject to disciplinary

action. After an Arlington County attorney wrote to the Bar asking if she could give appellants information for their directory, the Bar informed her that the Rule does not permit attorneys to do so.

Appellants filed this action on February 27, 1975. Their complaint alleged that the Virginia Bar and Virginia Court had violated appellants' rights under the first and fourteenth amendment and 42 U.S.C. Section 1983 to gather and publish, and their members' right to receive, information needed to select the most effective and satisfactory legal counsel. On April 14, 1975, a three-judge district court was convened.

On April 21, 1975, the district court entered a pretrial order prescribing a discovery and briefing schedule and setting trial on the merits for September 25, 1975. On September 25, 1975, the district court, despite appellants' vigorous objections, ordered that the trial on the merits be postponed until March 25, 1976, to permit the American Bar Association (which was then a defendant) to consider its ethics committee's possible recommendations for modifying the ABA Code of Professional Responsibility. In February, 1976, the ABA revised its Rule to permit publication of a few additional categories of information about lawyers.

On March 2, 1976, the district court, at the request of defendants, and over appellants' vigorous objections, again ordered that the case be continued to May 4, 1976 — to see what changes, if any, the defendants might make in their Rule. The district court subsequently continued the case yet a third time, to May 18, 1976, to await changes in the Rule.

On April 1, 1976, the Virginia Bar recommended to the Virginia Court a change in the Rule more limited than that

just adopted by the ABA. That amendment, if adopted would not have permitted the Consumer Groups to publish information they planned to include in their directory. (See App. 27-29) The Virginia Court has characterized that bar proposal as "a reflexive response to the ABA's action . . . submitted without supporting documentation . . . [that] did not satisfy the test laid down a year later in Bates."[3] The Virginia Court, on April 20, 1976, refused to adopt the Bar's proposal, stating that this change would "not serve the best interests of the public or legal profession."

On December 17, 1976, the district court held the Rule to be unconstitutional in part, but upheld the Rule's prohibition against publication of fees charged for services, other than an initial consultation. Appellants appealed to this Court the part of the decision upholding the Rule's prohibition against certain fee advertisement; defendants appealed that part of the decision which invalidated the other prohibitions in the rule.

While the appeals were pending before this Court, the decision in *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), established that the advertising of information on fees for routine legal services enjoys constitutional protection. Two days after the *Bates* decision, this Court vacated the district court decision in *Consumers Union* v. *American Bar Association* and remanded the case for a decision consistent with *Bates.*

Plaintiffs, on May 16, 1978, moved for a judgment on the merits, a permanent injunction and an order declaring defendants' liability for fees and costs. The Virginia Court and Virginia Bar did not contest plaintiffs' right to publish

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[3]Memorandum In Support of Petition for Rehearing at 3. *See also Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977).

any portion of the proposed directory or plaintiffs' entitlement to a permanent injunction. However, they claimed that sovereign immunity, judicial immunity and good faith immunity shielded them from liability for attorneys' fees under the Civil Rights Attorney's Fee Award Act. Both defendants argued that a fee award would be manifestly unjust.[4]

On May 8, 1979, the district court ruled that appellants' entire directory, as amended, is constitutionally protected and that Disciplinary Rule 2-102(A)(6) is unconstitutional on its face, and enjoined defendants from enforcing the Rule. In addition, the district court ordered the Virginia Court to pay appellants' costs and reasonable attorneys' fees. Fees and costs were not awarded, however, against the Virginia State Bar. The district court held that the Virginia Bar's effort on April 1, 1976, to change the Rule, and its lack of authority to promulgate an amended Rule, constitute special circumstances that would render an award against the Bar manifestly unjust.

The Virginia Court petitioned the district court for a rehearing. In its memorandum in support of the petition, the Virginia Court claimed that "since *Bates* was decided the Virginia Court has been presented with no opportunity to change the rules" because the Virginia Bar had submitted no proposed amendments to the advertising provisions.[5] It stated that after *Bates,* the Bar Council hired an outside consultant to gather information and recommend amendments to the Rule. That consultant did not report to the Bar advertising committee until June of 1978, and did not present any proposals until January of 1979.[6] In that month, the advertising committee recommended a new

[4]Brief on Behalf of Defendants at 12.

[5]Memorandum in Support of Petition for Rehearing at 3.

[6]*Id.* at 4-5.

advertising rule which was adopted by the Bar Council. However, the Bar Council failed to submit the rule to the Virginia Supreme Court, allegedly because it planned to consider amendments to the solicitation rules at an upcoming meeting. On April 27, 1979, solicitation rules were adopted. However, the Bar again failed to transmit a proposed new rule to the Virginia Supreme Court, this time because of an alleged "technical defect." The petition for rehearing was denied.

On June 7, 1979, the Virginia Court appealed the attorney fee Order to the U.S. Supreme Court, claiming that it was immune from the suit and the fee award. The Consumer Groups appealed the decision not to award fees and costs against the bar.

On June 1, 1980, this Court stated that it was not convinced that an award of fees against the Bar would be unjust, absent special circumstances in addition to what was disclosed in the record. This court noted that fees are routinely awarded against enforcement officials even though, had a state legislature acted or reacted differently, the suit would have been unnecessary. *Supreme Court of Virginia* v. *Consumers Union,* 100 S. Ct. 1967, 1978 (1980). The decision not to award fees and costs against the bar was vacated and remanded. *Consumers Union* v. *Virginia State Bar,* 100 S. Ct. 2980 (1980).

On remand, the district court held that an award of fees against the Bar would be unjust because of its endeavors, cited in that court's earlier decision, to have the Code amended. The district court held that the Consumer Groups, having prevailed against the Virginia Court in its enforcement capacity, are entitled to an award of attorneys fees from the Supreme Court of Virginia and its

Chief Justice, in their official capacities. The district court ordered these defendants to pay the Consumer Groups reasonable attorneys fees.

On January 28, 1981, the Virginia Court appealed the fee award Order to this Court and to the Fourth Circuit. On February 4, 1981, the Consumer Groups filed a Notice of Appeal to this Court and to the Fourth Circuit with respect to the denial of fees and costs award against the Bar.

THE QUESTION PRESENTED IS SUBSTANTIAL AND REQUIRES PLENARY CONSIDERATION BY THIS COURT

The district court decision not to award fees and costs against the Bar directly contravenes this Court's decision in *Supreme Court of Virginia* v. *Consumers Union,* 100 S. Ct. at 1978, and the requisites of the Civil Rights Attorney's Fees Awards Act (herein referred to as "the Act" or "CRAFAA").

Under this statute, prevailing plaintiffs are entitled to recover their fees and costs unless special circumstances would render an award manifestly unjust.[7] The presumption in favor of rendering an award is strong, since plaintiffs who bring CRAFAA cases act as private attorneys general vindicting important constitutional rights, *Northcross* v. *Memphis Board of Education,* 412 U.S. 427 (1973); *See* S. Rep. No. 94-1558, *supra;* H.R. Rep. No. 94-1558, *supra.* Exceptions are to be narrowly construed. *Bradley* v. *Richmond School Board,* 416 U.S. 696 (1973).

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[7]S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4 (1976) and H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 9 (1976), citing *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968).

Nonetheless, the district court, quite erroneously we submit, found a fee and cost award against the Virginia Bar to be unjust because of the Virginia Bar's effort, mentioned in its earlier decision, to amend the unconstitutional Rule. App. 4. This is the precise rationale given by the district court for denying a fee award against the State Bar in its earlier ruling. 470 F. Supp. at 1062-1063.. It concluded:

> defendant State Bar and its appropriate officers endeavored to persuade the Supreme Court of Virginia to amend DR 2-102 . . . . Despite these entreaties, the Supreme Court of Virginia declined to amend DR 2-102 (A)(6). Under these particular facts, it would be unjust to require the State Bar Defendants to pay plaintiffs' attorneys fees.

That is the precise rationale this Court reviewed and rejected on appeal, concluding "[w]e are not convinced that it would be unfair to award fees against the State Bar." 100 S. Ct. 1178.[8] Despite this ruling, the district court on remand again denied an award against the Bar for the exact reason this Court rejected. Such outright disregard of the opinions of this Court deserves plenary review.

Moreover, the district court's abuse of discretion in this case raises questions of fundamental importance. The District Court finds a fee award to be unjust solely because of a Bar effort long after this suit was brought, to amend the unconstitutional Rule. To permit this decision to stand

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[8]Having rejected this rationale, this Court vacated the decision not to award fees against the Bar and remanded the case. *Consumers Union* v. *Virginia State Bar,* 100 S. Ct. 2980 (1980). In *Supreme Court of Virginia* v. *Consumers Union,* this Court only vacated the judgment awarding fees against the Virginia Court. 100 S. Ct. 1978.

would undermine the purposes of the Civil Rights Attorneys Fees Awards Act.

Underlying the district court decision is the resurrection of a good faith immunity defense through the rubric of "injustice," in direct contravention of CRAFAA. Through the legislative history to CRAFAA, Congress explicitly nullified good faith as a defense to fee awards under this Act. The House Report notes disapprovingly that "in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy," citing *Wood* v. *Strickland,* 420 U.S. 308 (1975) and *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974), two cases upholding the doctrine of good faith immunity in damage actions.[9] After observing that fee awards in these cases are necessary to assure that certain constitutional rights are adequately protected, the Report states that good faith immunity would not apply to CRAFAA.[10] Instead, whenever plaintiffs prevails they are entitled reimbursement under CRAFAA, regardless of the good or bad faith of the defendant.[11]

Thus, this Court concluded in *Hutto* v. *Finney:*

> The Act [CRAFAA] authorizes an attorney's fee award even though the appeal was not taken in

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[9]H.R. Rep. No. 1558, *supra* at 9.

[10]H.R. Rep. No. 1558, *supra* at 9. See also S. Rep. No. 1011, *supra* at 5.

[11]As recognized in S. Rep. No. 94-1011, *supra* at 6:

> [I]f the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

bad faith; no one denies that.

437 U.S. at 678, 699, nt. 32 (1978). *Accord Brown* v. *Culpepper,* 559 F.2d 274, 278 (5th Cir. 1977). Even the district court in its earlier decision, held "that good faith is not a defense to 42 U.S.C. Section 1988 liability for attorneys fees." 470 F.Supp. at 1062 & 1059. The Bar's effort to amend the Rule is precisely the sort of effort that Congress intended to prevent from undermining a plaintiff's entitlement to reimbursement for litigation fees and costs.

Furthermore, the Bar's meager effort to amend the Rule, long after this suit was filed, does not render a fee award unjust. Prior to the filing of this action, the Bar played a major role in the infringement of appellants' and their members' constitutional rights. It was the Bar that petitioned the Virginia Court to adopt DR 2-102(A)(6) and that acted as the impetus behind the Court's approval of this unconstitutional Rule.[12] It was the Bar that later informed attorneys the Rule did not allow them to provide appellants with information for their directory. It was the Bar that (along with the Virginia Court) defended the Rule in this litigation. And, then, for more than two years after this Court had established in *Bates* that the Rule is unconstitutional, the Bar delayed the amendment of the Rule.[13] These actions of the bar directly contradict the district court's finding that an award against the Bar would be unjust.

The Bar's meager effort to amend the unconstitutional rule, having proposed it, enforced it, and defended it in this case, does not excuse the Bar's unlawful conduct. As observed by the Virginia Court, the Bar's proposed

[12]Rules of Court Order Amending, 211 Va. 295 (1971).

[13]*See* p. 4-5 *supra.*

amendment was a thoughtless, reflexive and unconstitutional proposal. If adopted, the proposal would not have permitted the Consumer Groups to publish information, such as fees for routine legal services, that they wanted to include in the directory. Thus, the Bar did not even attempt to accommodate the First Amendment rights of the Consumer Groups at issue in this case. Certainly, a defendant's effort that does not even attempt to redress the injuries at issue in a case cannot render a fee award against that defendant unjust.

If parties can escape their CRAFAA liabilities simply by proposing a dubious amendment to a rule or law, long after a suit challenging that provision is brought, the Act's provisions for reimbursement of parties who vindicate important constitutional rights through litigation will be rendered meaningless. To allow the District Court decision to stand would diminish CRAFAA's function of encouraging important litigation brought to protect precious constitutional rights. The question raised by this appeal, therefore, is substantial and deserving of plenary consideration by this Court, with briefs on the merits and oral argument.

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Attorneys for Appellants

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Consumers Union of the United States, Inc., et al.,	)	
Plaintiffs,	)	
	)	Civil Action
v.	)	
	)	No. 75-0105-R
American Bar Association, et al.,	)	
Defendants.	)	

Before BRYAN, Senior Circuit Judge, MERHIGE and WARRINER, District Judges.

ORDER ON ALLOWANCE OF ATTORNEY'S FEES

Upon the opinion of this Court filed January 8, 1981, it is now

ORDERED that the Supreme Court of Virginia and its Chief Justice, in their official capacities, pay to the Consumers Union of the United States, Inc., a reasonable sum as attorney's fees for the services of its counsel in this action, the amount of such payment to be agreed upon between the said parties within thirty (30) days of the entry of this order, failing which this Court shall, immediately or through reference to a master, determine the amount to be

allowed to the claimant therefor and to be adjudged against the Supreme Court of Virginia.

Done for this Court this 8th day of January, 1981.

Albert V. Bryan

Senior United States Circuit Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CONSUMERS UNION OF THE UNITED STATES, INC., et al., *Plaintiffs,*	:	
v.	:	Civil Action
AMERICAN BAR ASSOCIATION, et al., *Defendants.*	:	No. 75-0105-R

Albert V. Bryan, Senior Circuit Judge:

This action has been pending since 1975 before us, sitting as three-judge tribunal, with appeals at internals to the Supreme Court of the United States. It has now been refined to the sole question of whether the plaintiff, Consumers Union of the United States, Inc. (Consumers), having prevailed under 42 U.S.C. § 1983 on its assertion that Virginia Bar Code Disciplinary Rule 2-102(A)(6) (the Rule) unconstitutionally hindered its publication of a directory of attorneys practicing in Arlington County, Virginia,[1] is entitled to recover attorney's fees under 42

[1]Consumers Union of United States, Inc. v. American Bar Association, 470 F.Supp. 1055 (E.D. Va. 1979). The award of attorney's fees in this case, *id.* at 1058-63, was vacated, Supreme Court of Virginia v. Consumers Union of the United States 48 U.S.L.W. 4620 (June 2, 1980), and is before us again on remand.

U.S.C. § 1998 from the Virginia State Bar (Bar) and/or the Supreme Court of Virginia (Virginia Court).[2]

Detailed reiteration of the earlier course of this litigation is rendered unnecessary by the comprehensive opinion of the United States Supreme Court in *Supreme Court of Virginia v. Consumers Union of the United States,* 48 U.S.L.W. 4620 (June 2, 1980). Therein the Court relates the constituent facts, with the rulings of this Court thereon, that induced us to allow Consumers' claim for attorney's fees against the Virginia Court, while disallowing a like claim against the Bar. *See id.* at 4621-23.

The Supreme Court vacated the award of attorney's fees because it rested in part on consideration of the Virginia Court's adoption, and retention even after *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), of the disputed disciplinary provision – actions the Supreme Court held to enjoy absolute legislative immunity. 48 U.S.L.W. at 4625. On remand we again consider the propriety of a fee award against each defendant.

We adhere to the view, previously expressed in *Consumers Union of United States, Inc. v. American Bar Association,* 470 F.Supp. 1055 (E.D. Va. 1979), that special circumstances exist in this case rendering a fee award against the Bar unjust. As before, this conclusion is grounded on the Bar's endeavors to have the Bar Code amended to conform to constitutional standards. *See id.* at 1062-63.

The Supreme Court, even as it vacated this Court's fee award, indicated that the Virginia Court's capacity as a State enforcement authority rendered it properly subject

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[2]Unless otherwise indicated, references herein to the Supreme Court of Virginia include its Chief Justice in his official capacity.

to suit in this case. 48 U.S.L.W. at 4620-21, 4623-25. Moreover, it emphasized that a fee award based solely on the Virginia Court's enforcement role would not be improper, *Id.* at 4625.

The Virginia Court is a fundamental source and conduit of disciplinary enforcement authority. Although the Bar may be more active in this sphere on a day-to-day basis, it acts merely as an "administrative agency of the Court."[3] It seems clear that "in the circumstances of this case, a sufficiently concrete dispute is . . . made out against the Virginia Court as an enforcer," 48 U.S.L.W. at 4624 n.15, not only for amenability to suit, but also for the purpose of a fee award to Consumers, the prevailing party.

Nothing in the Supreme Court's opinion casts doubt on the propriety of this Court's earlier application of *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), to this case.[4] Under that standard, a court ordinarily should award reasonable attorney's fees to a prevailing civil rights plaintiff "unless special circumstances would render such an award unjust." *Id.* at 402.

Upon review of the record throughout this litigation, we conclude that no special circumstances have been shown that would render unjust an award of attorney's fees against the Supreme Court of Virginia. Accordingly, we will order the Supreme Court of Virginia and its Chief Justice, in their official capacities, to pay to Consumers reasonable attorney's fees for the services of its counsel in this action, insofar as such services were performed to pre-

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[3]Va. Code § 54-49.

[4]*See* 470 F.Supp. at 1061. The Supreme Court noted the application of *Piggie Park*, and commented briefly thereon. 48 U.S.L.W. at 4625 & n.17.

vent the enforcement of the Rule. The amount of the fees, if not agreed upon between the Supreme Court of Virginia and Consumers within 30 days from the date of our order, shall be determined by this Court directly, or after reference to an report thereon by a master.

Order follows.

MERHIGE, J.

I concur with the views expressed in Judge Bryan's succinct and learned opinion and write briefly in response to the dissent of my colleague, Judge Warriner.

While concluding it fruitless to address in any detail the views expressed in the dissent, I suggest that adoption of those views would, to a great extent, represent a rejection of Virginia's highest court's expressed opinion of its statutory and inherent enforcement authority. *See Button* v. *Day,* 204 Va. 547, 132 S.E.2d 292.

I decline, out of respect for the opinions of the Supreme Court of Virginia and the Supreme Court of the United States, as well as a duty to follow the law as enunciated by the Supreme Court, to ignore that of which I have judicial notice. *See Gormly* v. *Bunyan,* 138 U.S. 623, 635 (1890); *Mills* v. *Green,* 159 U.S. 651, 657 (1895).

Additionally, contra to Judge Warriner's expressed statements, the record amply supports and mandates the action the court this day takes.

Lest, however, one mistakenly attributes this response as a total rejection of the statements contained in the dissent, I acknowledge my concurrence with Judge Warriner's view that Plaintiffs' First Amendment rights

were thwarted. . . ." The complete statement reads, "Plaintiffs' First Amendment rights were thwarted, but were not 'chilled'"[1]. If, as I conclude, it is intended to suggest that a "thwarting" of one's First Amendment rights is less onerous than the "chilling" of one's First Amendment rights, my rejection is total.

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[1]Footnote 9 of the dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CONSUMERS UNION OF THE UNITED STATES, INC. *et al*	:	
v.	:	**Civil Action**
	:	**No. 75-0105-R**
AMERICAN BAR ASSOCIATION, *et al*	:	

WARRINER, District Judge, dissenting in part and concurring in part.

I dissent from the majority opinion with respect to its award of attorney's fees against the Supreme Court of Virginia.[1] Insofar as the opinion speaks to the Virginia State Bar, I concur in the result only.

I.

My dissent with respect to the fee award against the Virginia Court can be understood best by examining the record. Plaintiffs sought a declaratory judgment that the Virginia Court and the State Bar had violated the First and Fourteenth Amendment rights of plaintiffs and their members to gather, publish, and receive information regarding lawyers in Arlington County, Virginia. Plaintiffs also sought an injunction against the enforcement of the rule prohibiting advertising by lawyers, DR2-102(A)(6) of the Code of Professional Responsibility of the Virginia State Bar. The Complaint alleged that the

[1]Reference to the Supreme Court of Virginia, or to the Virginia Court, includes its Chief Justice in his official capacity.

Virginia Court had promulgated the Code[2] and that the State Bar had the delegated authority to enforce the Code. *Consumers Union of United States, Inc.* v. *American Bar Ass'n,* 427 F.Supp. 506, 508 (E.D.Va. 1976). The majority of this Court concluded in its original opinion that plaintiffs had a First Amendment right to gather, publish, and receive consumer information about lawyer, save for fee information.[3] *Id.* at 523. Accordingly, the majority held that insofar as DR2-102(A) (6) prohibited the advertising of not inherently misleading or deceptive consumer information, with the above exception, the public's right to the information was paramount, and the rule was *pro tanto* invalid. *Id.* at 521-23. In addition to this declaratory judgment, the Virginia Court and State Bar were enjoined from enforcing the rule. *Id.* at 523.

All parties appealed to the United States Supreme Court. The majority opinion was vacated and the case was remanded for "further consideration in light of *Bates* v. *State Bar of Arizona* [433 U.S. 350 (1977)]." *Consumers Union of United States, Inc.* v. *Virginia State Bar,* 433 U.S. 917 (1977). In light of *Bates,* we held on remand that the prior exception against fee advertising could no longer be maintained and that plaintiffs were entitled to gather and publish, and their members were entitled to receive, truthful information about lawyers, including fee information. *Consumers Union of United States, Inc.* v.

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[2]The sole allegation in the Complaint implicating the Supreme Court of Virginia in any way reads as follows:

> Defendant Supreme Court of Virginia adopted and promulgated the State Bar Code, purporting to act under the authority of § 54-48 of the Virginia Code.

Complaint, ¶3.

[3]The concurring judge, the writer of this dissent, held that fee advertising, except for the fee charged for an initial interview, was inherenty misleading. 427 F.Supp. at 525 (Warriner, J., concurring).

American Bar Association, 470 F.Supp. 1055, 1058 (E.D.Va. 1979). Thus, DR 2-102(A) (6) was struck in its entirety and the Virginia Court and the State Bar proposed and consented to the entry of a decree enjoining them from enforcing the invalidated rule.

Plaintiffs then asked for an award of costs, including attorney's fees under 42 U.S.C. § 1988. The majority of this Court held first that the Virginia Court was not protected by judicial immunity from an award of attorney's fees for acts performed in its "judicial capacity." 470 F.Supp. at 1059-63. Second, finding no "special circumstances" rendering an award of attorney's fees unjust, *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 402 (1968), the majority required the Virginia Court to pay a reasonable counsel fee to be determined by this Court. The clearly stated basis for the award was that the Virginia Court was recalcitrant in amending or repealing DR 2-102-(A) (6) after *Bates.* 470 F.Supp. At 1062-63. The State Bar, on the other hand, had petitioned the Virginia Court, even prior to *Bates,* to amend the rule to conform to what it deemed to be constitutional standards. This was considered by this Court as a special circumstance rendering an award of attorney's fees against the Bar unjust. 470 F.Supp. at 1062-63.

In my dissenting opinion I raised the argument that the promulgation of the Bar Code by the Virginia Court was not an act of adjudication but one of rulemaking. 470 F.Supp. at 1063-73. I concluded that the Virginia Court enjoyed absolute legislative immunity from suit in performing this rulemaking function. Thus, the Virginia Court was immunized from an award of attorney's fees. I concluded also that the Virginia Court should have been dismissed from the action entirely on the basis of its

legislative immunity even though its counsel had not pled nor argued this defense. *Id.* at 1073 n. 6.

On appeal, the United States Supreme Court disagreed with the majority opinion that promulgation of the Code was a judicial act. "[P]ropounding the Code was not an act of adjudication but one of rulemaking." *Supreme Court of Virginia* v. *Consumers Union of United States,* 48 U.S.L.W. 4620, 4623 (2 June 1980). The Supreme Court agreed with the dissenting opinion that the Virginia Court was cloaked with absolute legislative immunity from suit itself for actions in its legislative capacity. 48 U.S.L.W. at 4623-24.

Instead of dismissing the Virginia Court from the action at this point, the Supreme Court went further and concluded that "the Virginia Court and its Chief Justice properly were held liable in their enforcement capacities." 48 U.S.L.W. at 4624. The basis for this conclusion was apparently twofold. First, the Virginia Court had for some reason argued before the Supreme Court that it had inherent and statutory authority to discipline and regulate the Virginia Bar. The Supreme Court accepted this admission and held that this enforcement authority makes the Virginia Court a proper defendant in a suit under 42 U.S.C. § 1983 for declaratory and injuctive relief. 48 U.S.L.W. at 4624 & 4624 n. 15. Second, in light of the *Bates* decision the Virginia Court and the State Bar had accepted that DR 2-102(A)(6) could no longer be enforced against attorneys who provide plaintiff with the desired information. The Virginia Court and State Bar therefore had proposed and consented that they be permanently enjoined from enforcing the by then unenforceable rule. Accordingly, in our final order, consistent with the parties' consent, we enjoined the Virginia Court and the State Bar from enforcing the rule. *See* 43 U.S.L.W. at 4622 & 4622 n. 6. Thus, ap-

parently reasoned the Supreme Court, since the Virginia Court claimed it had enforcement functions and since it had consented to be enjoined from exercising that function, a routine § 1983 settlement had taken place.[4]

With all respect I submit that the Supreme Court's ruling with respect to the Virginia Court is somewhat contradictory. The Court recognized at the outset of its opinion that plaintiffs' complaint "alleged only that the court promulgated the Bar Code. The other defendants were alleged to have authority to enforce the Code." 48 U.S.L.W. at 4622. In addition, the Supreme Court recognized that the extent of the Virginia Court's statutory enforcement power is that it, along with all Virginia courts, may issue a rule against an attorney to show cause why his license to practice law should not be suspended or revoked. 48 U.S.L.W., at 4621. Beyond this, the role of the Virginia Court or any other court of record is wholly and simply adjudicative. The actual prosecution is by the Commonwealth's attorney. *See* Va. Code § 54-74 (Cum. Supp. 1980). Nevertheless, the Supreme Court concluded that "the Virginia Court and other courts in Virginia have enforcement authority beyond that of adjudicating complaints filed by others and beyond the normal authority of the courts to punish attorneys for contempt." 48 U.S.L.W. at 4621. The Supreme Court did not disclose the basis for this conclusion, and I can discern none. Indeed, the Virginia Court and other courts in Virginia exercise

[4]The Supreme Court had this to say:

> As already indicated, [Va. Code § 54-74 (Repl. Vo. 1978)] gives the Virginia Court independent authority of its own to initiate proceedings against attorneys. For this reason the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were.

48 U.S.L.W. at 4624. *See also Id.* at 4624 n. 15.

their contempt power in essentially the same manner as they exercise their authority over a lawyer in a disciplinary matter. *Compare Holt* v. *Virginia,* 381 U.S. 131, 132 (1965) (Virginia judge directed Commonwealth's attorney to prepare order directing lawyer to show cause why he should not be punished for contempt) *with* Va. Code § 54-74 (Cum. Supp. 1980) (Virginia Court or other court of Virginia issues a rule against attorney to show cause why his license to practice law should not be suspended or revoked; prosecution is by Commonwealth's attorney). Thus, the Virginia Court's enforcement authority under § 54-74 is not readily, if at all, distinguishable either functionally or legally from its contempt power.[5]

With respect to attorneys fees, the Supreme Court pointed out that this Court had premised its award on acts or omissions for which the Virginia Court enjoyed absolute legislative immunity. 48 U.S.L.W. at 4625. The Supreme Court held that this Court erred in basing the award of attorney's fees on the Virginia Court's failure to amend or repeal DR2-106(A)(6).

> [I]t was an abuse of discretion to award fees because the Virginia Court failed to exercise its rulemaking authority in a manner that satisfied the District Court.

Id. By way of *dictum,* the Supreme Court stated that it would not be improper to award attorneys fees based upon the Virginia Court's enforcement role. *Id.*

The majority opinion of this Court on remand has accepted this dictum as a command. With dispatch, the majority has ordered the Virginia Court and its Chief Justice

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[5]The only possible distinction is that the contempt power may be exercised summarily, whereas the enforcement authority may not. *See* Va. Code § 54-74 (Cum. Supp. 1980).

to pay plaintiffs' reasonable attorney's fees, "insofar as such services were performed to prevent the enforcement of the Rule." *Ante,* at ____. The majority finds support for its decision in its view that the Supreme Court vacated

> the award of attorney's fees because it rested *in part* on consideration of the Virginia Court's adoption, and retention even after *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), of the disputed disciplinary provision — actions the Supreme Court held to enjoy absolute legislative immunity. 48 U.S.L.W. at 4625.

Ante, at ____. (Emphasis added). This contention is erroneous. The majority's award of attorney's fees was based *entirely* on the Virginia Court's legislative role. No reading of the majority opinion admits to any other conclusion. *See* 470 F.Supp. at 1062-63. The Supreme Court has so held:

> The District Court's award of attorney's fees in this case was premised on acts or omissions for which [the Virginia Court] enjoyed absolute legislative immunity.

48 U.S.L.W. at 4624. If the fee award had rested only "in part" on the Virginia Court's legislative role, the Supreme Court may not have vacated and remanded; it most properly would have affirmed, stating the correct basis for the award, *e.g.,* the Virginia Court's enforcement role, and would have remanded only for a determination of reasonable fees.[6] Because this Court's award of attorney's

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[6]Indeed, had there been any proven basis in the record for the award of fees, the Supreme Court would not have awarded costs on appeal in favor of the Virginia Court. The Virginia Court clearly prevailed on appeal with respect to the attorney's fees issue.

fees was wholly in error the judgment was vacated and remanded instead.

Admittedly, the Virginia Court possesses the inherent and statutory authority to discipline and regulate the Virginia Bar. It is also true that we, in our pre-*Bates* opinion, enjoined the Virginia Court together with the State Bar from enforcing DR 2-106(A)(6). After *Bates,* the Virginia Court consented to the entry of a decree enjoining it and the State Bar from enforcing the invalid rule against lawyers who provided the information plaintiffs sought. Strictly speaking, then, it could be said that plaintiffs prevailed against the Virginia Court in its enforcement capacity.[7] Consequently, the Supreme Court has concluded that we properly held the Virginia Court liable in its enforcement role under § 1983 and has now foreclosed an examination here of that issue.

The point of my dissent, then, is that we are not foreclosed from re-examining the nature and extent of the Virginia Court's § 1983 liability in its enforcement capacity as it relates to the discretionary award of judgment against the Virginia Court for plaintiffs' counsel fees. Indeed, the Supreme Court has not commanded an award as the majority here supposes, but has directed that we consider the Virginia Court's "own *direct* enforcement role" in assessing attorney's fees. 48 U.S.L.W. at 4625. (Emphasis added).

It is true that "[f]ee awards against enforcement officials are run-of-the-mill occurrences . . . ." 48 U.S.L.W. at 4625. In fact, it is the general rule that attorney's fees are

[7]As demonstrated within, no such explicit holding emanated from this Court for the simple reason that no such issue was ever presented to this Court. It was actually the Supreme Court of Virginia which, on appeal, injected its enforcement role into the litigation.

ordinarily awarded under § 1988 to prevailing civil rights plaintiffs. "unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, supra,* at 402. With respect to the inquiry into the existence of "special circumstances," the Fourth Circuit has instructed:

> If this inquiry is needed, it should. . . . be an intensely pragmatic one. Its focus is rightly upon the justice under the total range of circumstances of conferring the benefit and imposing the concomitant burden represented by the fee award.

Bonnes v. Long, 599 F.2d 1316, 1319 (4th Cir. 1979). The court's discretion is to be exercised bearing in mind the purpose of § 1988 to encourage "private attorney general" suits. *Id.* It is inconsistent with the requirement of "an intensely pragmatic" inquiry to look at isolated phrases from the Supreme Court's opinion and pre-emptorily award counsel fees as the majority opinion has done. Instead, the inquiry must focus "upon the justice under the total range of circumstances" of awarding attorney's fees in this case.

The most careful examination of the record reveals that the issue of the Virginia Court's enforcement role was never presented to us. Prior to *Bates* there were no allegations, no proffers of evidence, no briefs, no arguments, and no findings of fact by this Court with respect to the direct or even the indirect enforcement role of the Virginia Court. The allegations and proofs showed no more than that the Virginia Court had adopted the Bar Code and had promulgated a procedure for enforcement of the Code. In practice the Virginia Court's day-to-day enforcement authority had been delegated to the State Bar and the various district committees. Va. Code § 54-59 (Repl. Vol. 1978); Rules for the integration of the Virginia State Bar, Part Six, Section IV, Subsection 13, 215 Va. 859, 946-49

(1975). It was as likely as not, under the record before us, that Virginia lawyers were personally opposed to advertising as it was that they refrained for fear of any prosecution by the Virginia Court. The issue, it must be repeated, simply was not alleged, proved, argued, or otherwise developed in the litigation in the trial court. This is a significant factor in determining whether plaintiffs are entitled to attorney's fees because of their efforts, prior to *Bates,* to enjoin the enforcement of the rule by the Virginia Court. They made none.

After *Bates,* the issue of the Virginia Court's enforcement role again was not raised by plaintiffs. This is not at all surprising. At this time, plaintiffs, along with all informed attorneys in the United States, knew that lawyers were free to advertise so long as the information was not deceptive or misleading. No one reasonably would have contended that DR2-106(A)(6) could be enforced at that time.[8]

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[8]This Court's post-*Bates* opinion related the following incident:

> In December, 1978, a Virginia Beach, Virginia, attorney was indicted under two Virginia statutes for publication of an advertisement that was virtually identical to the advertisement which the Supreme Court in Bates found constitutionally protected, but which DR2-102(A)(6) still prohibited. The chilling effect of DR2-102(A)(6) on First Amendment freedoms is yet extant, even if not subject to objective calculations.

470 F.Supp. at 1062.

While this recitation of alleged facts *aliunde* the record has emotional appeal, it had no legal significance in this case. The Virginia Beach lawyer was not prosecuted by the Virginia State Bar or by the Virginia Supreme Court. Neither entity had brought the charges. Further, the lawyer was not prosecuted under DR2-102(A)(6) or any other rule promulgated by or subject to be enforced by defendants. He was prosecuted by a local Attorney for the Commonwealth under statutes enacted by the General Assembly. If this incident tends to prove anything it tends to prove that defendants were *not* enforcing the defunct advertising ban.

Plaintiffs argued for the first time on remand that the Virginia Court has a "direct" enforcement role. This contention obviously has been grasped by plaintiffs as a result of the Supreme Court's suggestion that an award of fees against the Virginia Court in its enforcement capacity would not be improper. The record indicates, as I have attempted to demonstrate above, that plaintiffs never alleged nor proved in this case that the Virginia Court had a direct enforcement role with respect to Virginia lawyers.[9] The Virginia Court's so-called enforcement role is simply the authority to issue a rule to show cause against an of-

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[9]In addition, it should be noted that as a matter of law and fact the Virginia Court could not have disciplined or punished plaintiffs in its enforcement capacity. Unlike Virginia lawyers, plaintiffs were not threatened by prosecution for violation of DR 2-106(A)(6). Plaintiffs simply could not obtain the information sought to publish their directory because attorneys chose for whatever reason to obey the rule or to follow their own sense of propriety. Plaintiffs' First Amendment rights were thwarted, but were not "chilled." "Chilling" is philosophically and legally distinguishable from "thwarting." A citizen is chilled in the exercise of his rights when the State puts him in fear to deter him from the free exercise of his rights. Another citizen who is thereby denied an opportunity to hear the chilled citizen is thus thwarted. Both have protectable rights, but the citizen put in fear by the State elicits greater concern from the law.

This is not to suggest that plaintiffs were not entitled to vindicate their constitutional rights. *See* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57, 763-65 (1976); Consumer Union of U.S. v. American Bar Ass's, 427 F.Supp. at 517. As was observed at oral argument before this Court on remand, it matters not to the plaintiff who wields the buzz saw if he is being chewed up. It does matter, however, to the indiscriminately sued defendant who wielded not the buzz saw, in this case, the Virginia Court. The Virginia Court could only have affected plaintiffs in its legislative capacity as a result of its promulgation of the Bar Code. In this capacity the Virginia Court was immune from suit. 48 U.S.L.W. at 4623. It is thus unjust to award fees against the Virginia Court in an enforcement capacity, a capacity in which the Virginia Court was powerless as against plaintiffs.

fending attorney[10] in essentially the same manner as it would exercise its contempt power against an attorney. *See* Va. Code § 54-74(1) (Cum. Supp. 1980). The day-to-day authority to investigate and to report Bar Code violations to the Circuit Courts is vested in the State Bar through its several district committees. Rules for the Integration of the Virginia State Bar, Part Six, Section IV, Subsection 13, 215 Va. 859, 946-49 (1975). The actual prosecution of a violation is by the attorney for the Commonwealth in the Circuit Courts of the State. Va. Code § 54-74(3) (Cum Supp. 1980]). By statute the Virginia Court is, then, relegated to the adjudicative function of hearing Bar Code violation appeals. Va. Code § 54-74(5) (Cum. Supp. 1980). Whatever inherent or statutory enforcement role may be possessed by the Virginia Court, as a practical matter its *exercise* of power in virtually all cases is as a court of appeals of Bar Code violations.

That the Virginia Court ever consented to be included in the injunction prohibiting enforcement of DR2-106(A)(6) was an error resulting entirely from this Court's and defense counsel's lack of assiduousness, and not from plaintiffs' efforts to enjoin "enforcement" of the rule by the Virginia Court. Indeed, had the defense of legislative immunity been raised in the initial stages of the law suit the Virginia Court would have been dismissed out of hand. The defense of legislative immunity was overlook-

[10]In practice the issuance of such a rule is a rarity. Almost all complaints against offending lawyers emanate from sources other than the Supreme Court of Virginia. Inquiry of Allen L. Lucy, who has been Deputy Clerk and Clerk of the Supreme Court of Virginia, successively, since 1952, revealed that the Supreme Court of Virginia has issued less than a half dozen rules to show cause against offending lawyers in nearly thirty years.

This special inquiry was necessary to get a glimpse as to what the evidence might have been had plaintiffs alleged or attempted to prove the Virginia Court had exercised enforcement authority in this case.

ed.[11] As a result, the Virginia Court was permitted to be included as an injunctive defendant in both the majority's pre-and post-*Bates* injunction orders. This pleading lapse does not justify and award of attorney's fees against the Virginia Court. Indeed, such a circumstance is a "special circumstance" rendering an award of fees unjust.

In summary, I believe it is an abuse of discretion to award attorney's fees against the Virginia Court for not doing that which it was not alleged to have done; for not doing that which it was not proved to have done; for not doing that which, as against plaintiffs, it could not have done; and for not doing that which, in practice, it rarely does. Such an award would do nothing to further the purpose of § 1988 to encourage "private attorney general" suits. Rather, an award against the Virginia Court in its so-called enforcement role, based upon the record in this case, would simply be a determination that the fee should be paid by the Virginia Court without regard to the justice of the case.

With the respect to the State Bar, I concur with the result in the majority opinion but for a different reason. The majority has concluded that "the Bar's endeavors to have the Bar Code amended to conform to constitutional standards . . ." constitute special circumstances rendering a fee award unjust. *Ante,* at _____. This conclusion slips into the same error as did the majority's earlier opinion.[12] 470 F. Supp. at 1058-63. It focuses on legislative rather than enforcement activity.

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[11]It is clear that the defense had not been waived by the Virginia Court as is evidenced by the Supreme Court's decision. *See* 48 U.S.L.W. at 4623-24. *See also* 470 F.Supp. at 1071-72 (Warriner, J., dissenting).

[12]I can only assume, but not conclude, that our finding of special circumstances with respect to the State Bar was in error because the Bar's separate appeal was vacated and the case was remanded "for fur-

If the fact that the State Bar lobbied the Virginia Court for legislation to amend the Code is relevant at all, it is because it demonstrates, first, that the Bar was unwilling to enforce the rule against advertising and, second, that the Bar was not antagonistic to plaintiffs' claim for relief. Nevertheless, when the Virginia Court rejected the State Bar's petition for amendment to DR2-206(A)(6), the Bar was duty bound, as the Virginia Court's administrative agency for the regulation of the practice of law, [13] to defend the rule. In this context, the State Bar was required to defend on proper legal grounds a rule it believed to be unconstitutional. When the rule was ultimately struck down as unconstitutional, the State Bar was enjoined from enforcing it.[14] Technically, then, plaintiffs prevailed against the State Bar, even though the Bar was not opposed to the result. Under these circumstances, I cannot in good conscience require the Bar to pay attorney's fees simply because plaintiffs were technically the "prevailing parties."

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ther consideration in light of *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. ____ (1980)." Consumers Union of United States v. Virginia State Bar, No. 79-185 (U.S. Sup. Ct. 9 June 1980). However, the Supreme Court did not specifically rule nor indicate in *Consumers Union* that our finding with respect to the State Bar was "clearly erroneous." *See* 48 U.S.L.W. at 4625. *See generally,* United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948) (interpreting Fed.R.Civ.P. 52(a)). The Supreme Court merely stated that "[w]e are not convinced that it would be unfair to award fees against the State Bar. . . ." 48 U.S.L.W. at 4625.

[13] *See* Va. Code § 54-49 (Repl. Vol. 1978).

[14] It should be remembered that in Virginia, the State Bar is not the repository of enforcement authority. As the Supreme Court recognized, the Bar's actual enforcement authority is vested in district committees. 48 U.S.L.W. at 4621. Nevertheless, the Supreme Court said *in dictum* that it would not be unfair to award fees against the State Bar in its enforcement capacity. *Id.* at 4625. Here again the factual basis for the Supreme Court's opinion is not apparent in the trial record so far as this writer can discern.

In addition, it would be unfair to award fees against the State Bar for dutifully defending DR2-106(A)(6). This might not be true if the rule had been widely perceived, pre-*Bates*, as unconstitutional. This was not the case, however. The ban on lawyer advertising was a time-honored and and universally accepted regulation of the practice of law. Its constitutionality was not seriously questioned prior to *Bates*, in which the Supreme Court held, in a 5 to 4 advertise truthful information about their profession. Before the *Bates* decision the State Bar could have avoided its duty to defend DR 2-106(A)(6) only by pretending that this historical basis for the rule did not exist. Instead, the Bar did its best to defend the rule which it had not promulgated and did not fully support. To require the State Bar to pay plaintiffs' counsel fees under these circumstances would be a warning to all defendants similarly situated that they defend at their peril. In doubtful, but expensive litigation, the courts will be witnessing a "dive," in boxers' parlance, rather than the vigorous defense our adversary system demands. Congress could not have intended this result when it enacted § 1988.

These circumstances are also significant as they relate to the State Bar's "good faith." Though the Supreme Court has ruled that "bad faith" is not necessarily for an award of attorney's fee under § 1988, *Hutto v. Finney*, 437 U.S. 678, 693-700 (1978), the Court has not ruled that a party's good faith cannot at least be considered as a special circumstance in determining whether an award of fees is appropriate. *See* 470 F.Supp. at 1074 (Warriner, J., dissenting). Accordingly, the State Bar should not be required to pay plaintiffs' counsel fees where it defended the rule on proper legal grounds after making a good faith effort to have the Bar Code amended to reflect its perceived standards of constitutionality, and where it made a good faith effort to reach an amicable settlement between the parties after *Bates*.

On the basis of these special circumstances, an award of attorney's fee against the Supreme Court of Virginia and against the Virginia State Bar would be unjust and properly should be denied.

/S/ Dortch Warriner
U.S. District Judge

January 5, 1980

VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DISCIPLINARY RULE 2-102(A)(6)

DR 2-102 Professional Notices, Letterheads, Offices, and Law Lists.

(A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

* * *

(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice but only if authorized under DR 2-105(A)(4); date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military services; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associa-

tions; memberships and offices in legal fraternities and legal societies; technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented.

CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

42 U.S.C. Section 1988

In any action or proceeding to enforce a provision of sections. . . . 1983 . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CONSUMERS UNION OF THE UNITED STATES, INC. *et al*	:	*Feb. 4, 1981*
Plaintiffs,	:	
	:	
v.	:	**Civil Action**
	:	**No. 75-0105-R**
AMERICAN BAR ASSOCIATION, *et al*	:	
Defendants.	:	

NOTICE OF CROSS APPEAL

Consumers Union of United States, Inc. and Virginia Citizens Consumers Counsel hereby cross appeal to the United States Supreme Court from the part of this Court's judgment that denies an award of attorneys fees against the Virginia State Bar defendants under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. Section 1988, entered in the above captioned case on the eighth of January, 1981.

This appeal is taken pursuant to 28 U.S.C. Section 1253 and pursuant to other authority provided by case law.

Respectfully submitted,

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Dated: February 4, 1981

PROPOSED AMENDMENTS TO VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY

April 1, 1976

Amend DR 2-102 (A)(5) and DR 2-102(A)(6) as follows (additions are *underscored,* deletions appear in parenthesis):

(A) A lawyer or law firm shall not use *or participate in the use of* professional cards, professional announcements cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

(5) A listing of the office of a lawyer or law firm in the alphabetical and classified sections of the telephone directory or directories for the geographical area or areas in which the lawyer resides or maintains offices or in which a significant part of his clientele resides and in the city directory of the city in which his or the firm's office is located; but the listing *in the alphabetical section* may give only the name of the lawyer or law firm, the fact he is a lawyer, addresses, and telephone numbers, *and the listing in the classified section must comply with the provisions of DR 2-102(A)(6).* The listing shall not be in distinctive form or type. A law firm may have a listing in the firm name separate from that of its members and associates. The listing in the classified "section shall not be under a heading or classification. . .." other than "Attorneys" or "Lawyers," except that additional headings or classifications descriptive of the types of practice referred to in DR 2-105 are permitted.

(6) A listing in a reputable law list, (or) legal directory, *a directory published by a state, county or local bar association, or the classified section of telephone company directories* giving brief biographical and other informative date. A law list or *any* directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list *or any directory* is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates (;), a statement that practice is limited to one or more fields of law (;), *or* a statement that the lawyer or law firm specializes in a particular field or law practice, *to the extent permitted and in accordance with rules prescribed by the Supreme Court of Virginia;* (but only if authorized under DR 2-105 (A)(4);) date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; foreign language ability; names and addresses of references and, with their consent, names of clients regularly represented: *whether credit arrangements are accepted; office and other hours of availability; a statement of legal fees, if any, for an initial consultation and the availability*

upon request after consultation of an estimate of the fee to be charged for the specific services.